# In the Supreme Court of the United States

## No. 258.

**OCTOBER TERM, 1948.**

NATIONAL LABOR RELATIONS BOARD,
*Petitioner,*

vs.

THE PITTSBURGH STEAMSHIP COMPANY,
*Respondent.*

## BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

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### STATEMENT.

This respondent owns and operates a fleet of seventy-three vessels on the Great Lakes and their connecting and tributary waters (R. 664). These vessels, which are engaged in the carrying of bulk cargoes of iron ore, coal and limestone to and from various ports on the Great Lakes, are manned by approximately six hundred licensed officers and two thousand unlicensed men (R. 665). The alleged unfair labor practices, which the Board, in its complaint, charged were violative of Section 8(1) and (3) of the National Labor Relations Act, involved a period from December 15, 1943, to on or about June 17, 1944, during which time the National Maritime Union was attempting to organize the unlicensed personnel of respondent's fleet.

After issue was joined the Board's Trial Examiner conducted hearings in Cleveland, Ohio, and Duluth, Minnesota. The Board's witnesses, who for the most part were Union organizers, testified in Cleveland from July 26 to July 28, 1945, and the respondent's witnesses, consisting of licensed officers from several of the vessels, testified immediately after the arrival of their vessels in Duluth dur-

ing the period from August 28 to September 5, 1945. The hearings were concluded at Cleveland on October 2, 1945; and the transcript of testimony amounted to approximately thirteen hundred pages.

On December 28, 1945, the Trial Examiner filed his Intermediate Report, in which he found, in substance, that the Board had proved all of the allegations of its complaint (R. 799-843). Exceptions to the Report were filed by the respondent, with supporting brief. On June 27, 1946, the case was argued orally to the Board and submitted, for decision, on that date (R. 854). On August 13, 1946 (approximately 1½ months after submission), the Board issued its "short form" of Decision and Order in which it affirmed the rulings of the Trial Examiner and adopted his findings, conclusions and recommendations (R. 854-857).

The respondent filed a petition to review the Board's decision and order (R. 860, 861) and the Board answered and requested enforcement of the order (R. 862-866). On April 5, 1948, the Court below filed its opinion and entered its judgment denying enforcement of the Board's order (R. 867-872).

The Court stated that the respondent's challenge to the verity of the Board's findings and the validity of the order had led to a careful consideration of the record (R. 871). The Court said that such examination revealed that the Trial Examiner had held, without exception, whenever there was a conflict in the evidence, that the witnesses for the respondent were untrustworthy and those for the Board were reliable. It stated that "it becomes impossible to sustain an order upon the adoption of a trial examiner's report, which upon its face, so clearly bears the imprint of bias and prejudice that it lacks all semblance of fair judicial determination" (R. 872). The Court recognized the existence of the rule that the Board's findings are conclusive, if based upon substantial evidence, but it concluded that that rule is not applicable where, as here, the findings, themselves, are arbitrary and unfair (R. 872). The Court's

ruling was predicated upon the well established legal principle that "If an administrative agency ignores all the evidence given by one side in a controversy, and with studied design gives credence to the testimony of the other side, the findings would be arbitrary and not in accord with the legal requirement" (R. 871). The Court adverted to the fact that the evil inherent in the Trial Examiner's findings might have been cured had the Board made an exacting analysis of the evidence instead of the *pro forma* adoption of the findings, *in toto* (R. 872).

The petition for a rehearing was denied on June 4, 1948 (R. 903).

## ARGUMENT.

### POINT I.

**The decision below is predicated upon the doctrine that an Order which is based upon biased and arbitrary findings is invalid. The decision is not in conflict, but is in conformity with the decisions in the other circuits.**

One of the principal grounds on which the petitioner seeks a review of the decision below is that it is in conflict with decisions of the Fourth, Fifth, Seventh and First Circuits. A critical analysis of the cited decisions, in those circuits, will reveal that no such conflict exists.

The decision below and the decisions in the above mentioned circuits must be examined in the light of what was really at issue in each case. The petitioner herein seeks to predicate an alleged conflict upon the refusal of the Court below, to apply the "substantial evidence" rule and the rule that the Board is the sole judge as to the credibility of the witnesses. Neither rule was at issue in this case. Of transcendent importance was the obligation of the Board, under the Act, to make fair and true findings of fact, and having found that the Board had failed to do so it was not necessary to consider or determine the secondary question as to whether the findings were of were not

substantially supported. On this primary issue as to whether the Board, itself, had or had not discharged its statutory obligation, the decision is not in conflict with prior federal decisions.

In *National Labor Relations Board v. Auburn Foundry, Inc.*, 119 F. (2d) 331 (cited by petitioner, p. 9), the Court stated that "the essential question presented is whether the record substantially supports the finding of the Board" (119 F. (2d) at p. 333). The Court made no ruling concerning the effect of the Board's uniform crediting of its own witnesses on the validity or invalidity of the Board's order. That decision is not only distinguishable from the one at bar on that ground, but it is also distinguishable on the ground that the Board there made its own independent findings and did not "rubber-stamp" the findings of the trial examiner, as was the situation here.

In *National Labor Relations Board v. Robbins Tire & Rubber Co.*, 161 F. (2d) 798 (cited by petitioner, p. 10) the Court likewise was concerned only with the issue as to whether the Board's findings were supported by substantial evidence. The Court did not find that the Trial Examiner and the Board were guilty of a wholesale and uniform rejection of the respondent's testimony and its observation concerning the effect of such action, had it existed, on the validity of the Board's order was obviously dictum. That Court characterized the charge of impartiality as "crimination and recrimination," and passed on to a consideration of the evidence itself (161 F. (2d) 800).

In *West Virginia Glass Specialty Co. v. National Labor Relations Board*, 134 F. (2d) 551, certiorari denied 320 U. S. 738 (cited by petitioner, p. 11) the issue as to whether an order of the Board if based upon arbitrary and biased findings is invalid, was not involved. There was no finding by the Court that such arbitrary and biased findings did exist and the decision is simply a reaffirmance of the doctrine that in reviewing the findings of the Board the

Courts do not possess the power to resolve conflicts in the evidence or to determine whether or not the findings are clearly erroneous.

*National Labor Relations Board v. Bird Machine Co.*, 161 F. (2d) 589, 590, 591 (cited by petitioner, p. 9) is a decision which reaffirms the principle that it is not for the Court to weigh the evidence and adjudge the credibility of the witnesses and that the Board may credit its own witnesses to the exclusion of others. The Court was not called upon to determine nor did it decide the effect of bias and arbitrariness upon the Board's obligation to make fair and true findings.

All of the above mentioned decisions are distinguishable from this case, and the fact that in some of them the argument was advanced by the employer that the Trial Examiner had decided all issues involving credibility in favor of the Board, does not, in and of itself, we respectfully urge, create a conflict which this Court should feel impelled to resolve.

*The decision below is correct and is in conformity with other Circuit Courts of Appeals decisions.*

In *National Labor Relations Board v. A. Sartorius & Co.*, 140 F. (2d) 203 (C. C. A. 2), the controlling principle is announced by the Second Circuit Court of Appeals as follows (p. 205):

> "We are mindful of the fact that if an administrative agency ignores all the evidence given by one side in a controversy and with studied design gives credence to the testimony of the other side, the findings would be arbitrary and not in accord with the legal requirement. N. L. R. B. v. Union Pacific Stages, Inc., 9 Cir., 99 F. 2d 153, 177; N. L. R. B. v. Thompson Products, Inc., 6 Cir., 97 F. 2d 13, 15."

The Court ruled that because the Board, itself, had in that case analyzed the evidence and stated the reasons which caused it to reject certain portions, while accepting other parts, the charge of partiality could not be sustained. In

the case at bar the Court found that the Board had taken no such curative action.

In *N. L. R. B. v. Laister-Kauffmann Aircraft Corp.*, 144 F. (2d) 9 (C. C. A. 8), the Court, at page 16, states:

> "It is undoubtedly true that a Board which with 'studied design' ignores all the evidence adduced by the employer and views as truthful only the testimony of adverse witnesses, acts arbitrarily and not in accord with legal requirements. N. L. R. B. v. A. Sartorius & Co., 2 Cir., 140 F. 2d 203, 205; N. L. R. B. v. Union Pacific Stages, Inc., 9 Cir., 99 F. 2d 153, 177; N. L. R. B. v. Grieder Machine Tool & Die Co., 6 Cir., 142 F. 2d 163, 165. 'Testimony is the raw material out of which we construct truth and, unless all of it is weighed in its totality, errors will result, and great injustices be wrought.' N. L. R. B. v. Thompson Products, Inc., 6 Cir., 97 F. 2d 13, 15. And Section 10(e) of the Act, 49 Stat. 453, 29 U. S. C. A. § 160(e) which provides that 'The findings of the Board as to the facts, if supported by evidence, shall be conclusive,' does not, of course, compel the courts to accept findings reached by accepting evidence presented by one side to the controversy with total disregard for other worthy evidence before the Board. N. L. R. B. v. Union Pacific Stages, supra."

In *National Labor Relations Board v. McGough Bakeries Corp.*, 153 F. (2d) 420 (C. C. A. 5) the Court recognized the existence of its duty to see that the Act is "properly and fairly applied" and its statement concerning the Intermediate Report of the Trial Examiner is an exact description of the Intermediate Report in the instant case. The Court said (pp. 421, 422):

> "Under the Act, 29 U. S. C. A. § 160(e), this court on this petition for enforcement has 'jurisdiction of the proceeding and of the question determined therein,' and may enter 'a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board.' 'The findings of the Board * * * if supported by evidence, shall be conclusive.' It is our duty, as well as the Board's, to see

that the Act is properly and fairly applied, and not brought into disrepute by unlawful or palpably unjust applications of it. The general responsibility for fair and true fact findings is on the Board. As to them, we are to judge only whether they are supported by evidence. This latter task we find difficult in this case. The Record consists of about 3000 pages. The intermediate report of the trial examiner seems to us more like a trial argument than a judicial deliverance. Every issue without exception he found in favor of the Union. He resolved every conflict in testimony, whether serious or trivial, in favor of the Union. With complete consistency he found every witness for the Union reliable and truthful, and every opposing witness, whether the Company's president and supervisors, or Independent's adherents, untruthful and unreliable. Even witnesses called by the Board were reliable when they testified favorably to the Union, but otherwise not reliable."

The Board seeks refuge behind the provisions of Section 10(e) of the Act, 49 Stat. 453, 29 U. S. C. A. § 160(e), whenever the validity of its order is subject to attack. In *National Labor Relations Board v. Union Pacific Stages*, 99 F. (2d) 153 (C. C. A. 9) the Ninth Circuit Court of Appeals declared that that section did not afford the claimed immunity when findings were based upon acceptance of but part of the evidence. The Court said (p. 177):

"It is suggested that this court should accept the findings of the Board; that contradictions, inconsistencies, and erroneous inferences are immune from criticism or attack by Section 10(e) of the Act, 49 Stat. 453, 29 U. S. C. A. § 160(e), which provides that 'the findings of the Board as to the facts, if supported by evidence, shall be conclusive.' But the courts have not construed this language as compelling the acceptance of findings arrived at by accepting part of the evidence and totally disregarding other convincing evidence."

The decision below represents the application of the doctrine of the above cases to a situation which left that Court with no alternative but to declare the Board's order

invalid. That doctrine, which affords a necessary judicial curb of the wide powers of that administrative agency, is soundly and firmly established and no clarification of it by this Court, we respectfully submit, is required. The Board, by its petition herein, does not really seek to have an alleged conflict resolved nor the limits of its powers redefined. What it hopes for is to have this Court overrule the established line of authority which formed the sound basis of the decision below to the end that even that check on its own powers will be removed.

## POINT II.

**In reaching its conclusion concerning the invalidity of the Board's order the Court below did not disregard any established rule relative to the effect of bias on the determinations of a trial officer.**

The petitioner urges that the Court below was not justified in invalidating the Board's order in the absence of a finding that the bias of the hearing officer was based upon "a direct, personal, substantial, pecuniary interest in the outcome of the case." (Brief of petitioner, pp. 12-14.) It relies, in support of that contention, upon decisions of this Court and inferior federal courts in which the qualifications of trial judges have been attacked because of such alleged personal interest in the outcome of the cases which were to be tried before them. Those decisions involve, in most instances, the filing of affidavits of prejudice under Section 21 of the Judicial Code[1] and relate to the legal

[1] Section 21 of the Judicial Code provides as follows:

"Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last

*(Continued on following page)*

sufficiency of such affidavits. That statute was involved in both of the cases from which the petitioner quotes (*Berger v. United States*, 255 U. S. 22, 26; *Parker v. New England Oil Corp.*, 13 F. (2d) 497, 498), and inasmuch as the statute expressly requires that the judge must have "a personal bias or prejudice" before he may be disqualified, the decisions construing the requirements under that statute are not, we respectfully urge, authorities for the broad proposition for which they are cited.

The Court below did not, as the petitioner asserts, conclude that the Trial Examiner's findings on credibility indicated a prejudicial prejudgment of the issues. The order was invalidated because it was based upon an arbitrary and unjustified rejection of an entire segment of testimony by both the Trial Examiner and the Board. The petitioner, for obvious reasons, would like to have this entire matter discussed and decided on the "credibility" level but, as we have suggested elsewhere, the issue is much more fundamental. If individual rulings on credibility were alone involved the case might well be governed by the doctrine that the Board is the sole judge as to credibility of witnesses but this decision goes far beyond that and involves a pattern, a state of mind, which is inimical to a fair and proper administration of the Act, itself.

The case of *Tumey v. Ohio*, 273 U. S. 510, 523 (cited by petitioner) is authority for the principle that to subject

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preceding, or chosen in the manner prescribed in section twenty-three, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, * * * No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. The same proceedings shall be had when the presiding judge shall file with the clerk of the court a certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit or action."

a defendant to a trial involving his liberty or property before a judge having a direct, personal, substantial interest in convicting him is a denial of due process, but it is not an authority, as petitioner urges, for the proposition that, absent such interest, there is no denial of due process. The existence or non-existence of other types of bias and arbitrariness which are justification for the setting aside of the determinations of a trial officer was not, we respectfully submit, at issue in that case.

The case of *National Labor Relations Board v. Baldwin Locomotive Works*, 128 F. (2d) 39, 45 (C. C. A. 3) (also cited by petitioner), is simply a reaffirmance of the doctrine of the *Tumey* case, *supra*. In the above case as distinguished from the one at bar the alleged bias and prejudice of the trial examiner was manifested during the hearings and the Circuit Court of Appeals adverted to the fact that counsel for the employer had not taken any action to disqualify the examiner—a remedy which was clearly available to him (p. 45).

In the cases where the orders of the Board have been vacated because of the bias and prejudice of the trial examiners, that action has been taken by the courts in the absence of any showing of personal, pecuniary interest in the outcome of the case. A finding by the court that the trial examiner's general attitude or approach to the case was not impartial but partial, not disinterested, but partisan, has been sufficient to require the invalidation. In *National Labor Relations Board v. Phelps*, 136 F. (2d) 562 (C. C. A. 5) the Court states (p. 563):

> "The Board does not, indeed, it could not, contest the correctness of the principle respondents invoke, for a fair trial by an unbiased and non-partisan trier of the facts is of the essence of the adjudicatory process as well when the judging is done in an administrative proceeding by an administrative functionary as when it is done in a court by a judge. *Indeed, if there is any difference, the rigidity of the requirement that the*

*trier be impartial and unconcerned in the result applies more strictly to an administrative adjudication where many of the safeguards which have been thrown around court proceedings have, in the interest of expedition and a supposed administrative efficiency been relaxed. Nor will the fact that an examination of the record shows that there was evidence which would support the judgment, at all save a trial from the charge of unfairness, for when the fault of bias and prejudice in a judge first rears its ugly head, its effect remains throughout the whole proceeding. Once partiality appears, and particularly when, though challenged, it is unrelieved against, it taints and vitiates all of the proceedings, and no judgment based upon them may stand.''* (Emphasis supplied.)

Also see:

*N.L.R.B. v. Ford Motor Co.*, 114 F. (2d) 905 (C. C. A. 6);

*Berkshire Employees Assn. v. N.L.R.B.*, 121 F. (2d) 235 (C. C. A. 3);

*N.L.R.B. v. Western Cartage Co.*, 138 F. (2d) 551 (C. C. A. 2).

If proof of a direct, personal, pecuniary interest in the outcome of a case on the part of a trial examiner were necessary to invalidate an order of the Board the remedy would be non-existent for personal dishonesty on the part of these administrative officers is almost impossible of proof. We do not contend that the commission of any overt acts by the Trial Examiner in the instant case revealed any bias against this respondent, but the absence of an exhibition of such partisanship during the hearings is unimportant when it is so clearly reflected in his consideration of the evidence which was taken. The "proceeding" which the courts say must be surrounded by absolute fairness is not confined to the hearing alone but involves all that transpires from the filing of the complaint until the decision of the Board is rendered. As this Court said in

connection with the requirement that administrative proceedings be fundamentally fair (*Morgan v. United States*, 304 U. S. 1, 20):

> "The requirements of fairness are not exhausted in the taking or consideration of evidence but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps."

## POINT III.

**The Court below did not exceed its authority under Section 10(e) and (f) of the National Labor Relations Act nor does its ruling constitute an exception to the substantial evidence rule.**

Petitioner's contention that the sole function of the Court below was to determine whether the Board's findings were supported by substantial evidence and that an order may only be set aside because of insufficient evidence, is wholly without merit. That contention loses sight of the primary function which the courts, and they alone, have to determine whether fair treatment has been accorded to the parties and whether the Act has been fairly and properly applied. No restriction of that power is found in Section 10(e) and (f) of the Act. In *National Labor Relations Board v. Acme-Evans Co.*, 130 F. (2d) 477 (C. C. A. 7) a charge of bias and prejudice was levelled against the trial examiner and the reviewing court was faced with the contention, as here, that the above mentioned sections of the Act precluded an inquiry into the soundness of the charge. In concluding that it did possess the authority to decide that question the Court said (p. 481):

> "We are not justified, in extending this denial of our fact reviewing jurisdiction to questions like the one here before us. Given a reviewing jurisdiction, we conclude that it extends to all questions such as exist in appeals from equity decrees, save where that right is denied us by statute,—in this class of litigation by Section 10(e) (f) of the Act. Denial of jurisdiction to

review disputed issues of fact is limited to issues which grow out of asserted unfair labor practices. It does not extend to rulings on legal questions.

"An assault upon the fairness of the trial judge does not fall within the sections above quoted, wherein the Board's findings are unassailable.

"Whether the evidence established unfairness or bias so as to require a new trial or a holding that the examiner in this case was biased and prejudiced, is a question we must decide."

If the charge of unfairness is made the record must be examined to determine if the charge is sound. If the court comes to the conclusion that the charge is sound the defect is fatal and no additional examination is necessary to determine whether the Board's findings of fact are substantially supported. If the charge of unfairness is found to be unsound then, and only then, need the court determine the existence or non-existence of supporting evidence. When, and if, this second stage of the court's review is reached the restrictions imposed by the statute are admittedly controlling. Until that stage is reached the court's authority must be and is, we respectfully submit, unfettered. As the Court above so aptly points out, Section 10(e) and (f) of the Act relates only "to disputed issues of fact growing out of asserted unfair labor practices." The issue which the Court below decided is obviously not in that category. Neither the above mentioned statute nor any other of which we are aware prohibited the Court from considering and determining that issue.

The petitioner seeks to emphasize the fact that the Court below stated that the Intermediate Report "upon its face," bore the imprint of impartiality (Brief of petitioner, p. 15). This conclusion by the Court, given in the closing sentence of its opinion, was an accurate description of that document, but the Court's ultimate determination concerning the Trial Examiner's fairness or lack of fairness was made after "a careful examination of the record" (R. 871).

The argument advanced by the petitioner concerning the alleged binding effect of Section 10(e) and (f) of the Act is akin to its argument concerning the Board's authority relative to the credibility of witnesses. Both seek to exclude the courts from the exercise of functions which are an inherent part of judicial process. The outlook for parties who are amenable to this and other administrative agencies would be grim, indeed, if those agencies, by the simple device of pointing to the realms in which their decisions are unassailable, could successfully defy judicial inquiry into the over-all propriety of their administrative functions. No such immunity should or does exist.

**POINT IV.**

**The Court below is not guilty of violating any recognized legal doctrine.**

Contrary to the petitioner's assertion (Brief of petitioner, pp. 16, 17), the Court below did not predicate its decision upon a principle or rule which violates established legal doctrine. The Court's finding that the Trial Examiner had, without exception, ruled that all the witnesses for the Board were trustworthy and all of those for the respondent were unworthy of belief, was made after a careful examination of the record (R. 871). The Court by stating "Courts have recognized that it is contrary to human experience that all witnesses on one side of a case are falsifiers while those on the other side are all truthful, and this conclusion must be obvious to anyone with even a minimum experience as a trier of facts," was not announcing a legal maxim or a rule of thumb to be applied in cases involving the credibility of witnesses. The statement is merely a distillation, not only of that Court's experience in judicial and human affairs but the similar experience of other tribunals. If, as the Court states, that experience teaches that there is rarely any such blanket grouping of truth and falsehood as appear from the Trial

Examiner's rulings, that fact becomes an important and a proper factor in determining the fairness of those rulings. The right of the Court to draw upon that experience, in making its determinations, cannot, we respectfully urge, be reasonably disputed. Appellate judges, even though they may be removed from the controversies of the trial arena, are not required to divest themselves of all that experience has taught and to operate in a vacuum.

We know of no rule which precludes a trier of facts from sifting the testimony of each witness to determine the verity in a given situation and it is only by so-doing that the truth can ever be properly established. It does not follow that because a trier of facts believes that truth rests on one side of the controversy, all who testified to the contrary are perjurers. If the Trial Examiner in the instant case had attempted to separate the "wheat from the chaff" his true function as a trier of facts might have been performed. This he did not do and he emerges, therefore, not as an impartial referee but as a zealous advocate.

## POINT V.

**The decision below will not adversely affect the proper administration of the National Labor Relations Act.**

In an effort to invoke the supervisory and review powers of this Court it is not uncommon for administrative agencies to express the fear, as the petitioner does here, that a given decision will have a damaging effect, not only upon the administration of the statute under which the particular agency operates, but upon the entire field of administrative law. The petitioner's concern over the imminent breakdown of administrative processes is, we respectfully submit, completely groundless.

The petitioner views the decision below as a barrier to the honest determination of issues affecting credibility of witnesses by all hearing officers, everywhere. If the doctrines and principles which it announces are properly

used it can not conceivably have that effect, but will, on the contrary, be a bulwark against the forces which, if left unchecked, will bring the administrative agencies into disrepute. We will concede that the decision will act as a deterrent to hearing officers who are disposed to depart from accepted standards of impartiality, but to those who have no such inclinations, the decision will be an aid instead of a hindrance. The decision announces no rule with respect to the credibility of witnesses. It is, however, a reaffirmation of the principle that a hearing officer, in the discharge of his duty, must really determine such issues of credibility as exist and cannot, in feigned discharge of that duty, consider only the testimony of one party. That principle is undeniably sound and should be left undisturbed.

## CONCLUSION.

The decision below is correct. It is not in conflict with the decisions of either this Court or of other Courts of Appeals and it constitutes a reaffirmation of the sound principles announced by this Court and the courts of other circuits. No sound reason for the granting of the petition for a writ of certiorari has been asserted and the petition, we submit, should be denied.

Respectfully submitted,

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